



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 32 OF 2017**

**PETERLIS OUMA OBIERO.....1<sup>ST</sup> PLAINTIFF**

**COSMAS OCHIENG (Suing as an administrator of the estate of**

**THOMAS OKULLO ODUNDO (Deceased).....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JAMES JUMA ONGUKO.....1<sup>ST</sup> DEFENDANT**

**LANDS REGISTRAR, NAKURU.....2<sup>ND</sup> DEFENDANT**

**RULING**

***(An application for injunction; plaintiffs alleging that suit property was jointly bought with the 1<sup>st</sup> defendant; 1<sup>st</sup> defendant is now registered proprietor; 1<sup>st</sup> defendant asserting rights of a registered proprietor; court finds that plaintiffs have demonstrated sufficient interest in the property; prima facie case established; injunction granted)***

1. What is before the court for determination is plaintiff's Notice of Motion dated 6<sup>th</sup> February 2017. The plaintiffs seek prayers iii and iv thereof which read as follows:

*iii. THAT pending the hearing and determination of this suit, this honourable court be pleased to restrain the defendants, by themselves, their agents, servants, hooligans, hoodlums, hirelings and or proxies from further trespassing unto, entering, dealing and tampering with, alienating, cultivating, selling, disposing or in any way interfering with the land parcels No. Miti Mingi/Mbaruk Block 3/(Barut) 5712.*

*iv. THAT cost [sic] of this application be borne by the defendant [sic].*

2. The application is supported by the affidavit of the 1st plaintiff sworn on 6<sup>th</sup> February 2017 and file in court on 7<sup>th</sup> February 2017.

3. The 2<sup>nd</sup> plaintiff is a co-administrator of the estate of Thomas Okullo Odundo (Deceased). The plaintiffs' case is that pursuant to an agreement dated 24<sup>th</sup> April 2004 the 1<sup>st</sup> plaintiff, the 1<sup>st</sup> defendant and the deceased bought the suit property jointly but the 1<sup>st</sup> defendant fraudulently drafted a separate sale agreement dated 3<sup>rd</sup> July 2007 to the effect that he had exclusively bought the entire suit property. That

the 1<sup>st</sup> defendant has been trying to evict them from the suit property. That additionally, the 1<sup>st</sup> defendant unlawfully had himself registered as the sole proprietor of the suit property on 3<sup>rd</sup> November 2010. That prior to the death of the deceased on 31<sup>st</sup> May 2010, the 1<sup>st</sup> plaintiff, the 1<sup>st</sup> defendant and the deceased had subdivided the property into three portions and that each of them lived on his portion. That the 1<sup>st</sup> defendant is now seeking to evict the plaintiffs from the suit property and has commenced construction thereon. The plaintiffs thus pray for an injunction to restrain the defendants.

4. The application has been opposed by the 1<sup>st</sup> defendant. Though served, the 2<sup>nd</sup> defendant has not yet entered appearance or filed any response to the application. The 2<sup>nd</sup> defendant did not also participate in the hearing of the application.

5. The 1<sup>st</sup> defendant has filed a replying affidavit. He denies that the suit property was jointly bought as has been alleged by the plaintiffs. He deposes that he solely bought the entire property and exhibits the sale agreement dated 3<sup>rd</sup> July 2007 in support of that assertion. The sale agreement is allegedly witnessed by the deceased and the 1<sup>st</sup> plaintiff among others. That he is now the registered proprietor of the suit property and that he had only allowed the 1<sup>st</sup> plaintiff and the deceased to live on the land in the year 2008 until the post-election violence that was then ongoing subsides. That unfortunately the deceased passed away and his children continued to live on the land and that the deceased's children purported to sell a portion of the land to the 1<sup>st</sup> plaintiff. That arising from the dispute the area Chief registered a restriction against the title on 20<sup>th</sup> January 2016.

6. Counsel for the plaintiffs submitted that an injunction ought to issue since the 1<sup>st</sup> defendant had destroyed a portion of a fence separating 1<sup>st</sup> defendant's portion from 2<sup>nd</sup> plaintiff's. Further that the 1<sup>st</sup> defendant's title was tainted by fraud and had been obtained through corrupt schemes.

7. Counsel for the 1<sup>st</sup> defendant opposed the application and submitted the issue of whether or not the 1<sup>st</sup> defendant's title was valid can only be determined upon a hearing of the main suit. That as long as the 1<sup>st</sup> defendant is the registered proprietor he ought not to be hindered from enjoying his property. Counsel however offered that status quo may be maintained with the 1<sup>st</sup> defendant retaining possession pending hearing and determination of the suit.

8. I have considered the application. There is no doubt that the 1<sup>st</sup> defendant is currently the registered proprietor of the suit property. Section 26 of the Land Registration Act therefore comes into play. It provides as follows:

*26. Certificate of title to be held as conclusive evidence of proprietorship*

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

*(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

9. The plaintiffs have argued that the 1<sup>st</sup> defendant's title was acquired through fraud and or a corrupt

scheme. These allegations must however be proven through a trial. For now the 1<sup>st</sup> defendant enjoys the rights and privileges provided for under the constitution and Section 25 (1) of the Land Registration Act. The section states as follows:

25. *Rights of a proprietor*

(1) *The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

*(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

*(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register*

10. It however cannot be said that the plaintiffs have absolutely no connection to the suit land. By 1<sup>st</sup> defendant's own admission the 1<sup>st</sup> plaintiff and the deceased played some part in his acquisition of the property. Whether their role was limited to being just witnesses as the 1<sup>st</sup> defendant asserts or as joint purchasers as the plaintiffs allege is a question to be determined at the hearing. It suffices for now that they have a real connection with the suit property. Additionally, the 1<sup>st</sup> defendant acknowledges that the plaintiffs and the deceased have been resident in the suit property and that as a result of their claims the area Chief registered a restriction against the title on 20<sup>th</sup> January 2016.

11. In the end I find that the plaintiffs have made out a prima facie case and that the suit property therefore ought to be preserved pending the hearing and determination of the suit.

12. I therefore order that pending the hearing and determination of this suit, the defendants are restrained whether by themselves, their agents, servants, and or representatives from carrying out any construction upon, alienating, selling, transferring, or making disposition in respect of land parcel known as **Miti Mingi/Mbaruk Block 3/5712(Barut)**.

13. Costs of the application are awarded to the plaintiffs.

14. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 31<sup>st</sup> day of March 2017.

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Ogola for the plaintiffs

No appearance for the 1<sup>st</sup> defendant

Ms. Cheruiyot for the 2<sup>nd</sup> defendant

Court Assistant: Gichaba